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No. 80-1213

In the Supreme Court of the United States

OCTOBER TERM, 1980

EILEEN ELDORADO JOHNSON, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks review of her conviction for attempted income tax evasion, claiming that the government's rebuttal evidence, which indicated that petitioner had submitted false medicaid billings, violated Fed. R. Evid. 404(b).

1. Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted of attempting to evade her personal income taxes for the years 1972, 1973, and 1974, in violation of 26 U.S.C. 7201. Petitioner was fined

$8,000 on each count, with all but $3,500 of the fine imposed upon all counts suspended, and was placed on probation for a period of two years. The court of appeals affirmed (Pet. App. 1a-7a).

After the government concluded its case-in-chief, petitioner presented seven witnesses who testified that her reputation as a law-abiding citizen was good and that she had a good reputation for truth and veracity (V Tr. 98, 101, 105, 107, 110, 116, 232; Pet. App. 2a).[1] All but two of these witnesses were asked whether they knew how busy petitioner was in her practice, and they responded that she was very busy and worked long hours (V Tr. 97, 101-102, 107-108, 116, 232; Pet. App. 2a). Petitioner testified that her staff did all of the financial work and that she kept no records (V Tr. 127-129); that her returns were prepared by others and that she simply signed them without studying them (V Tr. 132); that she never had anything to do with the receipts from her practice (V Tr. 139); and that she was never curious as to how much money she was making from her practice because she was interested in medicine, devoted all of her time to it, and never paid any attention to the financial aspects of her business (V Tr. 147-148).

In rebuttal, the government called Robert Pemberton, an auditor for the United States Department of Health, Education, and Welfare, who testified that he had determined after investigation that during the period from February 1976 through January 1979 petitioner had billed the federal government and received payment for medical services that were

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[1] "Tr." refers to the transcript of trial proceedings. "J. App." refers to the joint appendix filed in the court of appeals.

not reflected on her patients' charts and that her patients said they had not received (Pet. App. 2a-3a; V Tr. 236-237). Based upon his investigation, Pemberton concluded that petitioner's truthfulness was questionable (V Tr. 238-239).

The petitioner testified again, and on cross-examination the government asked: "Who would have received the benefit of all the fraudulent forms for Medicaid that were filed?" Petitioner objected to the characterization of the forms as fraudulent and moved for a mistrial (J. App. 25). The court denied the motion and gave the following cautionary instruction to the jury (J. App. 28):

> Ladies and gentlemen of the jury, whether or not fraudulent claims had been filed for Medicare would be up to you to determine from that, not what any of the attorneys say. You understand that, all of you understand, you disregard the last question that was asked.

2. Relying on Fed. R. Evid. 404(b), petitioner argues (Pet. 5-10) that Pemberton's testimony was inadmissible because it constituted evidence of specific misconduct used to prove the bad character of the defendant.[2]

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[2] Petitioner also asserts (Pet. 12) that Pemberton's testimony and the trial court's cautionary instruction to the jury indicating that they were to determine whether or not petitioner's billing practices were "fraudulent" violated her rights to be informed of the nature of the charges against her and to be tried only for the offense charged. Petitioner was tried for and convicted of the charges in the indictment, *i.e.*, attempted income tax evasion. The trial court simply directed the jurors to ignore the prosecutor's characterization of the evidence, and, in evaluating the significance of Pemberton's testimony as it related to petitioner's defense of inadvertence, to make their own determination of whether petitioner had engaged in "fraudulent" billing practices.

Rule 404(b) provides:

> (b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Petitioner argues that she merely introduced testimony concerning her reputation for truth and veracity and as a law-abiding citizen (see Fed. R. Evid. 404(a)(1), 405(a)) and that the government was precluded from using specific acts of misconduct to rebut this evidence. However, petitioner went beyond merely attempting to establish that the general estimate of her character was so favorable that it could be inferred that she would not be likely to commit the offense charged. See *Michelson* v. *United States*, 335 U.S. 469, 476 (1948). Rather, as the court of appeals recognized (Pet. App. 2a, 5a), through her own testimony, and that of others, petitioner attempted to depict herself as having had nothing to do with the preparation of her tax returns because she cared nothing for money, having chosen, instead, to devote her time to the demanding personal needs of her patients. Under these circumstances, the district court did not abuse its discretion under Rule 404(b) in permitting the government to introduce evidence of other acts suggesting that petitioner's characterization of herself as a person who cared nothing for money was not credible and that she had possessed the state of mind requisite to guilt of the offense charged. See, *e.g.*, *United States* v. *Jacobson*,

578 F.2d 863, 866-867 (10th Cir.), cert. denied, 439 U.S. 932 (1978).[3]

Moreover, as the court of appeals noted (Pet. App. 3a), petitioner did not make timely objection to this testimony. Although petitioner's counsel objected to Pemberton's testifying to the results of any general study by HEW (V Tr. 234), he specifically indicated that he had no objection to the witness' testifying as to what he knew (V Tr. 235), to what the witness discovered during his investigation (V Tr. 235, 237), or to the government's bringing out specific instances of conduct (V Tr. 236). The failure to make timely objection to the admission of the evidence waived any challenge petitioner might have been entitled to raise concerning the admission of the evidence, absent plain error affecting substantial rights. *Lawn* v. *United States*, 355 U.S. 339 (1958); *United States* v. *Elmore*, 423 F.2d 775, 777 (4th Cir.), cert. denied, 400 U.S. 825 (1979). See also Fed. R. Evid. 103 (a)(1), 103(d); Fed. R. Crim. P. 52(b).

The admission of Pemberton's testimony, even if error, did not affect petitioner's substantial rights.

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[3] Petitioner's reliance (Pet. 6-9) on *United States* v. *Benedetto*, 571 F.2d 1246 (2d Cir. 1978); *United States* v. *Reese*, 568 F.2d 1246 (6th Cir. 1977); *United States* v. *Curry*, 512 F.2d 1299 (4th Cir.), cert. denied, 423 U.S. 832 (1975); *United States* v. *Davenport*, 449 F.2d 696 (5th Cir. 1971); and *Eley* v. *United States*, 117 F.2d 526 (6th Cir. 1941), is misplaced. In *Curry*, *Davenport*, and *Eley*, the courts simply held that evidence of specific misconduct was inadmissible to show bad character. Similarly, in *Reese* the court noted that evidence of specific misconduct was inadmissible to show bad character, but held that the evidence in question was admissible on the issues of knowledge and intent. In *Benedetto*, the court concluded that the evidence of specific misconduct was inadmissible to show knowledge and intent since those issues were not seriously disputed, but held the evidence admissible on other grounds.

It was not contested at trial that petitioner's tax returns for the three years at issue substantially understated her taxable income and that there was a resulting understatement of tax liability for the years at issue of approximately $31,000. Petitioner's sole defense was that she had nothing to do with the financial aspects of her medical practice, entrusting that chore to her employees. There was, however, testimony from one of petitioner's employees that petitioner was intimately involved in the preparation of the summaries that were given to petitioner's accountant to serve as the basis for preparation of her tax returns (II Tr. 112-113). This testimony was corroborated by the petitioner's handwritten notations on the summaries (II Tr. 114-115; V Tr. 155, 161-164). Under these circumstances, there is little likelihood that Pemberton's testimony had any substantial effect on the jury's verdict.[4]

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[4] Nor is there any merit in petitioner's suggestion (Pet. 12) that the admission of Pemberton's testimony denied her the Sixth Amendment right to confront the witnesses against her because Pemberton had related the hearsay responses of petitioner's clients. Petitioner made no objection to that testimony at the time upon the ground that it violated her Sixth Amendment right, and, therefore, such "testimony, even * * * [if] improper, * * * [became] part of the record and * * * [was] available to be considered for its probative value by the trier of fact." See *United States* v. *Fowler*, 608 F.2d 2, 8 (D.C. Cir. 1979), quoting *United States* v. *Jamerson*, 549 F.2d 1263, 1267 (9th Cir. 1977). Furthermore, the hearsay statements of petitioner's clients apparently only confirmed what was obvious from their charts, namely, that they had not received all of the treatment for which the federal government had been billed; therefore, admission of the statements cannot constitute "plain error." Fed. R. Crim. P. 52(b).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
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